In my judgment, the District Judge should have been satisfied, on the evidence produced by the parties, that it was more probable than not that the alternative accommodation was safe. As he did not dismiss the plaintiffs' claim, it is reasonable to infer that he was in fact so satisfied. He appears, however, by acting on his interpretation of his powers under section 18 of the Ordinance, to have subjected the plaintiffs to the burden of proving their case beyond reasonable doubt, which is more onerous than the burden imposed by law on the plaintiff in a civil case. Furthermore, the course he took was open to the objection that it gave an unfair advantage to a defendant who had failed to produce proper evidence that the alternative accommodation was not safe.

In my view, there is no substance in the contention that the District Judge was wrong in fact in holding that the alternative accommodation was suitable. It is true that he erred in law by calling for a certificate from the City Architect and hearing the evidence of an architect from his department. But if the certificate and evidence of the architect are excluded, there was sufficient evidence to justify the decision that the alternative accommodation was suitable.

The contention that it was wrong in law for the District Judge to hold that the alternative accommodation was suitable is based on certain evidence given by the architect from the Chief Building Surveyor's Department. As the whole of the evidence given by this witness has to be disregarded for the reason given above, this contention falls to the ground.

The result is that the judgment of the District Court is upheld and the appeal is dismissed; and the defendant is ordered to pay the plaintiffs' costs here and in the Court below.

Appeal dismissed.

Solicitors: *Leicester & Chen; Oehlers & Choa.*

KANNAPPA CHETTIAR v. SCULLY & ANOR.

[O.C.J. (Hepworth J.) February 9, 1962]

[Penang — Civil Suit No. 25 of 1961]

Money and Moneylending — New promissory note — Whether renewal of old promissory note — Whether cash or cheque must be handed over to constitute loan — Non-delivery of copies of promissory notes to defendant — Whether enforceable — Moneylenders Ordinance, 1951, s.16.

The plaintiff, a licensed moneylender, claimed against the defendants jointly and severally as makers of three promissory notes the principal sums of $1,200 together with interest thereon from April 28, 1955 at the rate of 18% less the sum of $70 which had already been paid by the defendants. The defendants' main defence was that no money passed but that the three promissory notes were renewals of old promissory notes in respect of money lent in 1952 and that as no copies of the said promissory notes were delivered to the defendants, the plaintiff's claim was unenforceable by virtue of section 16(1) of the Moneylenders Ordinance, 1951.

Held: a loan is made though no cash or cheque is handed to the borrower, provided the money expressed to be lent is appropriated by the moneylender as authorised by the borrower even if this amounts to the renewal of the previous loan. A transaction wiping off an old loan by treating it as a new loan on altered terms must be shown on the face of it to comply with section 16(4) of the Moneylenders Ordinance, 1951.

Cases referred to:—

(1) *Chethambaram Chettiar* v. *Loo Thon Poo*, [1940] M.L.J. 31; [1940] M.L.J. Rep. 25.
(2) *B.S. Lyle Ltd.* v. *Chappell*, [1932] 1 K.B. 691.
(3) *Dunn Trust Ltd.* v. *Teale* (1928), Leeds Assizes (unreported).

CIVIL SUIT.

Triptipal Singh for the plaintiff.

Defendants in person.

Cur. Adv. Vult.

Hepworth J.: The plaintiff is a licensed moneylender carrying on business under the firm name of VR. KN. Firm at No. 49, Macalister Road, Penang, and the 1st and 2nd defendants are employees of the City Council Water Department, Penang.

The plaintiff's claim is against the defendants jointly and severally as makers of three promissory notes for the sums of $600, $500 and $100 all payable on demand and all dated the 28th April, 1955. The plaintiff alleges that the defendants have only paid a sum of $70 on account of interest due under such promissory notes and that the whole of the principal and interest at the rate of 18 per centum per annum less the said sum of $70 is still outstanding. The plaintiff's claim is, therefore, for the principal sums referred to above together with interest thereon from the 28th April, 1955, at the rate of 18 per centum per annum less the said sum of $70.

The defendants allege that on the 28th April, 1955, no money passed but that the three promissory notes were renewals of old promissory notes entered into in respect of money which was lent by the plaintiff to the defendants during the year 1952, that no copies of the said promissory notes were delivered to the defendants, and that accordingly the plaintiff's claim is unenforceable by virtue of the provisions of section 16(1) of the Moneylenders Ordinance, 1951.

The plaintiff stated that the 1st defendant was introduced to him by one Shanmugam in 1953. On that occasion the 1st defendant borrowed $120 (the first loan) and the plaintiff alleges that that loan was repaid the same year. A record of the loan and a record of the repayments appear at page 127 of P.2.

On the 5th September, 1953, both the defendants came to see him, the plaintiff said, and asked him to give them a loan. To this he agreed and gave them a loan of $360 (the second loan). A record of this loan appears at page 25 of P.1.

Again on the 6th September, 1953, the plaintiff said the defendants came and borrowed a further sum of $375 (the third loan). A record of this loan appears at page 185 of P.2.

On the 21st October, 1953, the plaintiff said both defendants borrowed a further sum of $195 (the fourth loan). A record of this loan appears at page 34 of P.1.

As regards the second loan the plaintiff stated that on the 15th October, 1953, a sum of $60 was paid towards the principal and $5.50 towards the interest, on the 18th December, 1953, similarly, sums of $60 and $4.50 were paid, and on the 18th April, 1955, similarly, sums of $240 and $61.20 were paid. With these last payments the total amount due in respect of the second loan was settled.

As regards the third loan the plaintiff stated that on the 1st October, 1953, a sum of $75 was paid towards the principal and $5.65 towards the interest, on the 18th December, 1953, similarly, sums of $75 and $9 were paid, on the 18th February, 1954, similarly, sums of $75 and $3.40 were paid, and on the 18th April, 1955, similarly, sums of $150 and $33.75 were paid. With these last payments the whole amount due in respect of the third loan was settled.

As regards the fourth loan P.1 at page 34 shows that $95 was repaid on the 21st January, 1954, and the balance of $100 together with $21 interest was repaid on the 18th April, 1955.

The 1st defendant stated that he first met the plaintiff in 1951 when he went to 140, Dato Kramat Road with one Shanmugam. They borrowed $100, of which $50 is still outstanding because Shanmugam did not repay his share of the loan.

In 1952, the defendants said, both the defendants went to see the plaintiff and each borrowed $300 from him, the 1st and 2nd defendants signing the promissory note in respect of the loan to the 1st defendant and the 2nd defendant and his wife signing the promissory note in respect of the loan to the 2nd defendant. The 1st defendant said his promissory note was made out for $360, being $300 principal and $60 interest. The defendants said they only paid 5 or 6 instalments on these loans.

It was these three loans which the defendants say were renewed when they signed P.4, P.5 and P.6.

I find it difficult to believe that the plaintiff would say that loans were made in 1953 if they were in fact made in 1952. On the other hand the defendants have maintained from the outset that no loans were made to them after 1952, and I cannot see that they had any reason for or obtained any advantage by so saying if it was not true.

It is the plaintiff's case that after the 18th April, 1955, nothing was due or owing from the defendants or either of them to the plaintiff, and it was only after loans totalling $1,200 were made on the 28th April, 1955, that the defendants again became indebted to the plaintiff. The loans comprised in the three promissory notes, P.4, P.5 and P.6, totalling $1,200 are the subject matter of this action, and the plaintiff alleges that on the 28th April, 1955, the defendants were handed the $1,200 in cash at his place of business at 49, Macalister Road, Penang. The plaintiff said that at the time that this transaction was carried out a gentleman named Venadasalam Chettiar (P.W. 2), whom he used to appoint as his attorney when he went to India, was also present.

It is the defendants' story that the transaction with regard to these three promissory notes was carried out at the plaintiff's premises at No. 140, Dato Kramat Road, Penang, and not at Macalister Road, and that no money passed, the three promissory notes being renewals of the old promissory notes with the outstanding interest added to them, and that no one else was present except the plaintiff and the two defendants with the 2nd defendant's wife waiting outside on the 5 foot-way.

I do not propose to refer to all the evidence in detail but merely to those aspects of it which I consider are relevant for the purpose of reaching a decision in this case. I should perhaps make it clear at this stage that the plaintiff is represented by counsel, but the defendants appear in person. The onus of proving that he had complied with the provisions of the Moneylenders Ordinance, 1951, is upon the plaintiff.

On the face of the statement of claim the fact that for one loan of $1,200 made on the same day, that is the 28th April, 1955, it appeared to be necessary to use three promissory notes is a matter which calls for some explanation. On examination-in-chief the plaintiff explained this by saying that three promissory notes were used because he did not have in his possession at the time the transaction was completed one single promissory note stamped sufficiently to cover the sum of $1,200. This, in the first place, is improbable on the plaintiff's own story because he said that the defendants had asked him for the loan of $1,200 two days previously when he had told them to come back two days later. It would have been reasonable to expect him, if such was the case, to have a sufficiently stamped promissory note ready for their return. On perusal of the promissory notes P.4, P.5 and P.6 however it appeared that P.4 was stamped sufficiently to cover a loan of more than $1,200. The documentary evidence therefore did not on the face of it support the plaintiff's explanation.

The defendants, as I have already said, appeared in person and they did not notice this point, which was not clarified in examination-in-chief or in re-examination, and accordingly I considered that it was incumbent upon me to endeavour to clarify the position at the end of the plaintiff's evidence, as the evidence as it stood indicated that there might have been a failure to comply with the provisions of section 16(1) of the Ordinance in that the promissory notes were not signed before the money was lent. Also it was quite clear not only from the pleadings but from the cross-examination of the plaintiff by

the defendants that, as I have already said, the defendants were saying that the transaction took place in the presence of the plaintiff and themselves alone and that no money passed, the new promissory notes P.4, P.5 and P.6 being renewals of the old promissory notes given in respect of these previous loans. The fact that there were three promissory notes all given on the same day supported the defendants' allegation that they were renewals of three old promissory notes unless the plaintiff could give a satisfactory explanation why it was necessary to have three promissory notes instead of one.

On being asked whether the stamps on P.4 were not more than enough to cover a stamp on a promissory note for a loan of $1,200 the plaintiff admitted that they were but said that originally when these promissory notes were signed one of the defendants made a mistake when filling in the form so that that promissory note had to be discarded and he, the plaintiff, had to borrow a stamped promissory note from one of his neighbours and that was the promissory note P.4. This was clearly a possible explanation and as he had said that P.W.2 had been present when this transaction was taking place I asked him if P.W.2 was present at the time when this happened. The plaintiff's reply was that it was at this time when they were writing the promissory notes that he, P.W.2, was coming in. The plaintiff also stated that the man from whom he borrowed this stamped promissory note form was one Subramaniam Chettiar, a moneylender carrying on business at the same address, 49, Macalister Road.

The plaintiff's evidence as to this incident, however, was not supported by the evidence of P.W.2. First of all P.W.2 said that he arrived at the plaintiff's place of business before the defendants. Secondly, he said that the whole of the time that the defendants were with the plaintiff and himself when the loan was arranged nobody else was present and while the transaction was going on no one left the room and no one came into the room. Thirdly, he said that he was not aware of any mistake having been made in the filling in of one of the promissory notes which necessitated the preparation of a fourth promissory note in place of one of the other three. And fourthly, he said that although he knew all the people living at 49, Macalister Road he could not remember someone of the name of Subramaniam Chettiar.

From the conflict between the evidence of these two witnesses I have formed the opinion, after giving due allowance for the fact that these events took place some years ago, that the witness P.W.2 was not present at the time and was not telling the truth when he said he was. I cannot think of any reason why the plaintiff should say P.W.2 was present if he was not, except to substantiate the plaintiff's contention that these three promissory notes had been given for cash. I think that the plaintiff was not speaking the truth when he said that P.W.2 was present. I am accordingly unable to accept the plaintiff as a witness of truth, and I am unable to accept his statement that $1,200 in cash was handed to the defendants on the 28th April, 1955.

What then is the truth of the matter? I am driven to the conclusion that the full story has not been told by either party. As I have already said I find it difficult to believe that the plaintiff would put in his books dates which were not correct as to when loans were made and when certain of the repayments were made. I can see no purpose in his so doing. On the other hand as regards the payments which were recorded as having been made on the 18th January, 1955, these entries might very well have been made either in anticipation of the renewal of the promissory notes to cover the principal and interest outstanding on the existing loans, which is alleged to have taken place 10 days later, or because the transaction was in fact completed on the 18th April, 1955, the promissory notes being dated the 28th April, 1955. The purpose of this would be to have evidence available suggesting that the transaction alleged to have taken place on the 28th April, 1955, was a fresh loan, should the need arise. The history of the haphazard manner in which the loans were being repaid suggests that the payment of all sums of principal and interest outstanding all at once on the 18th April, 1955, to be on the face of it unlikely, particularly as it is supposed to have been followed 10 days later by the borrowing of even larger sums.

Taking the plaintiff's figures as to the amounts of principal and interest outstanding at the beginning of April, 1955, the combined total would not be as high as $1,200. Nor on such figures as it is possible to obtain from the defendants' evidence would the amount then outstanding total the sum of $1,200. This is a fact that tends to support the plaintiff's version of the transactions.

I think that the answer is that the defendants were given fresh loans which together with the amounts outstanding on the existing promissory notes in respect of both principal and interest added up to $1,200. In other words when the transaction was completed, whether that took place on the 18th or the 28th April, 1955, fresh sums were lent to the defendants and some cash was handed to them but not amounting to $1,200.

In his closing address Mr. Triptipal Singh submitted that, even if the defendants' contention was true that no cash had been handed over in exchange for the three promissory notes and they had been renewals of old promissory notes, the loans were still enforceable, and in support of this submission he quoted the case of *S.R.M.S. Chethambaram Chettiar* v. *Loo Thon Poo and S.M.S. Sinniah Chettiar* v. *Puan Ying* [1]. This is a Privy Council case in which while considering an appeal in connection with matters

arising under the Johore Usurious Loans Enactment it was held that where a loan has been incurred for interest there is no objection in principle to such interest being added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt.

The relevant portions of sub-section (1) of section 16 of the Moneylenders Ordinance, 1951, are in *pari materia* with sub-section (1) of section 6 of the English Moneylenders Act, 1927. In the case of *B.S. Lyle Limited* v. *Chappell* [2], in which the effect of section 6 of the Moneylenders Act, 1927, was considered it was held that when an earlier loan is being repaid by means of money borrowed from the same lender on a second loan with different terms of payment it is not necessary that the lender should actually hand to the borrower the amount due on the first loan and that the borrower should hand it back to the lender in payment of that loan. If the lender cancels the first loan and advances the difference, if any, between the loans he is entitled to say that he has advanced the amount of the second loan. In his judgment in this case Scrutton L.J. said at page 699:—

"The moneylenders were in this difficulty. First, they or their legal advisers took the view that there could not be a legal memorandum of a renewal of a loan on altered terms, because the Act required a memorandum before the money was lent or the security given, which they read as referring to the original loan or security, and not to the terms substituted later. Secondly, they had to consider a judgment of Charles J. in *Dunn Trust Ltd.* v. *Teale* [3], in which he held that where an old debt purported to be settled by a new loan, a statement to that effect must appear in the memorandum. As to the first point, I find it difficult to believe that Parliament intended to render renewals of loans or of the securities for them on altered terms impossible by requiring that a memorandum of the alteration should be signed before the original loan was made. In my opinion, when the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of section 6 might be better, but I cannot think that Parliament intended to render renewals impossible. As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan on the altered terms, when the fact that this is being done is shown on the face of the second memorandum."

The case referred to by Lord Justice Scrutton, *Dunn Trust Ltd.* v. *Teale* [3] is unreported, but it would appear from the manner in which the learned Lord Justice referred to it and from his concluding sentence referred to above that the note or memorandum in such circumstances must state what the transaction is, that is to say that it is the renewal of an old loan including the sum agreed to be due under the old loan as interest. In *Lyle's case* Lord Justice Greer said at page 706:—

"It appears to have been held in a case at Leeds by Charles J. that unless money was actually handed over by the lender to the borrower, it could not be said that any note or memorandum was signed before the money was lent. In my judgment this is taking too strict a view of the meaning of section 6. I think money is lent within the meaning of that section if it is applied by the lender to the purposes of the borrower in any way which the borrower authorises."

In *Chethambaram Chettiar's case* referred to above in delivering the judgment of the Board Lord Fairfield said at page 26:—

"Their Lordships are of the opinion where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. As one member of this Board, when sitting in the Court of Appeal, pointed out in the case of *Lyle* v. *Chappell*, page 706, it ought not to make any difference to the validity of a transaction by way of a renewal of a loan, whether the parties go through the form of payment by the borrower of the whole amount due and a relending of the same amount by the moneylender, or the transaction is carried out without any such payment by treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of the agreed debt."

These decisions can be summarised by saying that a loan is made though no cash or cheque is handed to the borrower, provided the money expressed to be lent is appropriated by the moneylender as authorised by the borrower, even if this amounts to the renewal of a previous loan. On the renewal of an old loan a second memorandum is signed before the money is lent if the terms of the renewal are shown on the memorandum and it is signed before the new security is given. (*Halsbury's Laws of England*, 3rd Edition, Vol. 27, page 31, footnotes (o) and (a)).

In the case of a promissory note that the transaction was wiping off an old loan by treating it as a new loan on altered terms would, in my opinion, have to be shown on the face of it in order to comply with the requirement of sub-section (4) of section 16 of the Moneylenders Ordinance, 1951, that it contains "all the terms of the contract".

I am indebted to Mr. Triptipal Singh for drawing my attention to *Chethambaram Chettiar's case*, but I do not think it assists him for two reasons. Firstly, he has not pleaded that even if no money passed the amount owing on the security of the three promissory notes P.4, P.5 and P.6 is recoverable. It has been his case all along that cash passed and as he did not plead in the alternative that even if cash did not pass the Moneylenders Ordinance, 1951, had still been complied with that argument is not available to him now. Secondly, in any event P.4, P.5 and P.6 give no indication in any way at all that they are, putting it shortly, renewals of old promissory notes. They do not show the "terms of the renewal" or in other words "all the terms of the contract".

The plaintiff's claim is, therefore, dismissed. As regards costs, as it is my view that the veracity of the parties leaves a good deal to be desired this is a case in my opinion in which it will be appropriate for the parties to pay their own costs, and I order accordingly.

Claim dismissed.